

**Comments of the American Forest and Paper Association,
American Petroleum Institute, Council of Industrial Boiler
Owners, Portland Cement Association, U.S. Tire
Manufacturers Association, Air Permitting Forum, and
Auto Industry Forum**

EPA, Draft *Guidance on Plantwide Applicability Limitation
Provisions Under the New Source Review Regulations*,

(Feb. 13, 2020)

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These comments are submitted on behalf of the American Forest and Paper Association, American Petroleum Institute, Council of Industrial Boiler Owners, Portland Cement Association, U.S. Tire Manufacturers Association, Air Permitting Forum, and Auto Industry Forum (collectively, “the Associations”) in response to the U.S. Environmental Protection Agency’s (“EPA” or “the Agency”) draft guidance document entitled *Guidance on Plantwide Applicability Limitation Provisions Under the New Source Review Regulations* (Feb. 13, 2020) (“Draft Guidance”).

The Associations’ members own and operate facilities throughout the United States that are subject to Clean Air Act regulation, including Prevention of Significant Deterioration (“PSD”) and Nonattainment New Source Review (“NNSR”) (collectively, “NSR”) preconstruction review and permitting requirements under Title I of the Act. In 2002, EPA issued NSR reform regulations to address longstanding concerns of regulated entities regarding the disincentives that prior interpretations of the regulations had created for improving productivity of plants, improving competitiveness of U.S.-based operations, and simultaneously reducing emissions.¹ These regulatory reforms are now the framework of the NSR program nationwide and have worked well.

Another important part of the NSR reform rules is the plantwide applicability limit (“PAL”) program. EPA adopted the PAL program following a “pilot program” of sorts that worked within the construct of the pre-existing regulations to create plantwide limits that both incentivized emissions reductions and emissions efficiency and streamlined recordkeeping and post-project emissions tracking. While such “PAL-like” permits were adopted by several companies prior to 2002, the process was resource intensive. EPA’s adoption of PAL regulations was intended to create a process that provides transparency and encourages broader use of PALs to achieve their potential benefits.

PALs represent an “agreement” that provides benefits to air quality and to companies’ operational flexibility to respond to changing market conditions. Under a PAL, a facility voluntarily accepts a limit on its plantwide emissions that is more restrictive than would be allowed under the regulations if NSR applicability was evaluated on a project-by-project basis. This provides a significant air quality benefit that would not otherwise be attained because the basic structure of the NSR program requires that each project be evaluated separately, allowing emissions increases up to the designated “significance level” for each project. In accepting a PAL, a facility generally agrees that for a 10 year period, it will limit itself to a single significant increase above baseline actual emissions. This means that within the PAL, a facility that wants to add new emissions must find a way to reduce emissions elsewhere in the plant. In exchange, the company has a much more straightforward emissions increase analysis available to it, is subject to a single plantwide limit on emissions increases rather than numerous different NSR limits, and can utilize more streamlined recordkeeping and reporting provisions for future projects. It also provides the certainty that if the company manages its emissions, it can move quickly to respond to market demand because the permitting regime has been set – *i.e.*, there is no delay associated with

¹ EPA, *Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects; Final Rule*, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (“2002 NSR Rule”).

negotiation of additional permit terms for the facility. This is particularly the case where the state issues a PAL that also addresses minor NSR applicability.²

PALs, therefore, represent an advantageous opportunity for both the environment and for regulated entities, offering an incentive to facilities to quickly respond to market conditions in exchange for agreeing to cap emissions below the levels that would otherwise be required, achieving air emissions reductions that would not otherwise exist. The Associations support EPA's intent to expand the utilization of PALs by removing misconceptions and clarifying for permitting authorities how they can apply the regulations to encourage use of PALs and to obtain their benefits for air quality and economic growth in their areas.

It is in the spirit of expanding the opportunities for environmental and economic benefits from PALs that we offer the following comments on the Draft Guidance.

I. PALs represent an important aspect of EPA's NSR reform efforts and provide both air quality and economic benefits to states that facilitate their adoption.

As indicated above, the PAL regulations were one outcome of the 2002 NSR reforms, and reflected an important element to illustrate how carefully drafted permits can facilitate both economic and environmental improvement.³

Ordinarily, a major stationary source not subject to a PAL will trigger major NSR only for those physical changes or changes in the method of operation (*i.e.*, projects) that, on their own, will result in a significant increase in emissions. Each individual project may increase emissions up to the significance level, meaning that the statute (including the implementing regulations) contemplates that multiple projects may occur at a plant, each being permitted to increase emissions in a *de minimis* (*i.e.*, less than significant) manner. Under a PAL, however, a source voluntarily agrees to limit all emissions increases associated with all projects to below a single significance level for the entire facility for ten years. As a result, any facility that agrees to a PAL necessarily gives up this project-by-project ability to undertake *de minimis* emissions increases. At larger plants, or even smaller ones, there are often multiple products and production units, for which the ability to implement multiple projects with *de minimis* increases could provide value. The benefit of this bargain from the facility perspective is more certainty about the timing and outcome of pre-project permitting evaluation and streamlined post-project emissions tracking and recordkeeping (*e.g.*, a facility does not need to keep project-by-project emissions analyses of actual emissions and track those individual projects for up to 10 years). While the Draft Guidance document appropriately highlights the streamlining benefits achieved for facilities, we think it is also helpful to explain the broader benefits of the PAL program and to explain how PALs have

² The Associations note that EPA may be able to achieve even greater penetration of PALs and their benefits if it addresses the ability to apply PAL limits in lieu of limits agreed to in consent decrees once those decrees have been terminated. In practice, some state agencies have been concerned that the terms of a consent decree, even if terminated, prevent application of a PAL in a manner that would allow particular emission units to exceed previously-established consent decree limits.

³ Although PALs are one way to encourage these dual goals in permit drafting, there are other ways to draft permits that should also be encouraged more generally.

benefited air quality over the years. This will highlight for states an additional reason why their permitting authorities should encourage these permitting approaches.

II. The Draft Guidance adds helpful clarity to address uncertainty and concerns raised by stakeholders with respect to the logistics of PAL operation, including permit reopening provisions, PAL expiration, and adjustment of PAL levels at renewal, although some revisions should be made to the final guidance.

a. Permit Reopening

The PAL regulations provide several circumstances under which permitting authorities either *must* reopen a PAL permit or *may* do so. As EPA notes in the Draft Guidance, stakeholders have raised concerns about the discretionary reopening provisions in the PAL regulations. In particular, stakeholders noted that the provision allowing for discretionary reopening to address air quality standard violations (to avoid causing or contributing to a National Ambient Air Quality Standard (“NAAQS”) or Prevention of Significant Deterioration (“PSD”) increment violation) or adverse impacts to a Federal Class I area creates a lack of certainty as to PAL levels established in a permit and as to precisely what circumstances may lead to a change.⁴ EPA characterizes these concerns, however, as “largely unfounded.”⁵ In support of that assessment, EPA points to the broad state authorities to address air quality management issues under EPA-approved state implementation plans (“SIPs”) and so would be unlikely to use the PAL program to accomplish such goals. EPA also correctly acknowledges that most NAAQS contain short-term averaging periods, as opposed to the ton per year limits in PALs, and thus it would be inappropriate for a permitting authority to target a ton per year limit at a facility under a PAL rather than use its authority to require controls consistent with the shorter averaging periods to address air quality concerns.

While the Associations agree that mechanisms other than reopening a PAL are available to obtain reductions, it would be helpful for EPA to explicitly encourage states, as a matter of policy, to prioritize their efforts to solve air quality management issues by looking at other options first before undermining a PAL agreement. As discussed above, by definition, a PAL source has made a voluntary commitment to forgo *de minimis* increases in exchange for certainty over the term of the PAL, and by doing so, has already gone beyond that which is required by the NSR regulations. Even where a PAL source is operating well below the cap at a given point in time, the company’s reason for entering into the PAL is often because it anticipates increased market demand that will evolve over the coming decade, though not knowing specifically the timing of those market developments. The company’s benefit is that it will be able to respond quickly to market changes within the PAL and it is important that a company that agrees to a PAL on those terms not be penalized for having done so. This perception that companies entering a PAL will be penalized is likely preventing companies from engaging in PALs that would otherwise do so. We encourage EPA to strengthen its point in this section and to emphasize not just that states have other mechanisms that they *may* employ to address air quality concerns but that they *should* look to those other options rather than penalize PAL sources, whenever possible.

⁴ Draft Guidance, at 2-3.

⁵ *Id.* at 3.

b. Expiration

The Draft Guidance also responds to concerns about how a PAL may be divided among the sources within a facility upon its expiration. EPA explains that some stakeholders had raised concerns that the PAL regulations and existing guidance do not provide specific criteria about such distribution, but EPA pointed to the process for renewal, which requires sources to first submit proposals for how to distribute a PAL among emission units to permitting authorities, as comfort for sources given the Agency's expectation that permitting authorities will typically accept sources' proposals for distribution.⁶ The concern for regulated entities contemplating PALs is that by entering the PAL in the first place, they give up the ability to make *de minimis* increases for each particular project, which could have increased emissions well above the PAL level and would not have triggered NSR.

EPA appropriately acknowledges that the decision of whether to renew a PAL or allow it to expire belongs to the source.⁷ This is critical because business circumstances may change over the course of a decade and it is important for a source to retain the flexibility to revisit issues with respect to its operations and adjust accordingly. For example, consolidation within an industry or a particular company changes business needs and can result in fewer manufacturing facilities nationwide.

With respect to distribution of a PAL among emissions units under the PAL, the Associations strongly support EPA's recognition that distribution can be accomplished in a reasonable manner to individual emission points or to groups thereof.⁸ It is unmistakably correct that "emission unit" can be defined in a flexible manner and that its definition in regulations is open to interpretation. To say that multiple emission points can comprise an emission unit is an unremarkable proposition. To that end, many permits are and always have been drafted to reflect an appropriately-defined emission unit that may be comprised of multiple emission points. This is important because it supports the fact that it should be the source itself, that best knows and understands its own operations, in the first instance that defines what its emissions unit is for the purposes of its permit.

The Draft Guidance also offers helpful clarification that limits applied to emission units after expiration and distribution of a PAL retain the 12-month rolling basis from the PAL.⁹ This statement is important to sources that otherwise may be reluctant to enter PAL agreements, especially those sources with 12-month rolling limits prior to entering into a PAL. If, once the PAL ends, such sources were prescribed very short-term limits that penalize them for having entered into a PAL, they could end up in a far worse position than if they had never entered a PAL agreement. If sources believe a PAL may lead to that unfavorable a result, they will be less likely to consider entering PAL agreements in the first place. Thus, EPA's clarification that 12-month rolling limits should follow the end of a PAL affords sources needed reassurance about the result of PALs.

⁶ Draft Guidance, at 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 5.

Finally, the Draft Guidance provides that expiration of a PAL does not require limits on capacity to emit originally eliminated by the PAL to be reestablished, and that limits on allowable emissions created by the PAL expiration are not limits “on the capacity of the source or modification otherwise to emit a pollutant” that may trigger 40 C.F.R. Section 52.21(r)(4) upon subsequent relaxation.¹⁰ The Associations agree with these statements. Immediately following these clear and helpful propositions, however, EPA might be misread to suggest that expiration and distribution of a PAL constitutes a change in the method of operation. Specifically, the Draft Guidance states that “relaxation of such limits, even absent any other physical change or change in the method of operation of the unit(s) subject to the limit, would qualify as a change in the method of operation.”¹¹ This statement is confusing because it is unclear what “such limits” is referencing and how exactly EPA believes they would be “relaxed” in the context of distributing the PAL limit. This type of uncertainty is the very thing that has discouraged companies from utilizing PALs.

A key purpose of the PAL program is to provide flexibility to facilities that enter into PAL agreements. Yet, a facility’s operations are already constrained upon expiration and distribution of a PAL. For instance, under a PAL a facility can operate any emissions unit at any rate provided the combined emissions do not exceed the PAL, but upon expiration of the PAL, because the PAL level is less than the combined potential to emit for all the emissions units, the emissions units become constrained by being subject to allowable emission limits below their potential to emit. These constraints can be particularly problematic for facilities that are unable to reach agreement with permitting authorities regarding how the PAL is distributed. Distributing the PAL, which may restrict emissions, should not in and of itself be considered an operational change that could trigger NSR. In other words, that action should not trigger an actual-to-projected-actual analysis such that distributing the PAL itself could lead to major NSR. The process of PAL termination and distribution is provided for in the PAL regulations¹² and, therefore, does not constitute a change in the method of operation.

c. Adjustment on Renewal

The PAL regulations include provisions that provide for adjustment of the PAL on renewal. This concept of an “automatic ratcheting” down has been a major concern with the PAL program among stakeholders. In the Draft Guidance, EPA clarifies scenarios in which it would expect a PAL to be renewed at a lower level, but also reaffirms that the regulations neither provide for automatic downward adjustment at renewal, nor prevent renewal at either the current PAL level or higher than baseline actual emissions plus the applicable significant level; any of those outcomes may be appropriate on a case-by-case basis.¹³ Indeed, EPA appropriately clarifies that the PAL regulations “do not require automatic downward adjustment” and the permitting authority must bear the burden of justifying a proposed adjustment to a PAL level at renewal.¹⁴ The Associations strongly concur with this statement, but urge EPA to expand it in the final guidance document to make clear that this process must be done in light of the fact that facility has

¹⁰ *Id.* (quoting 40 C.F.R. § 52.21(r)(4)).

¹¹ *Id.*

¹² 40 C.F.R. § 52.21(aa)(9).

¹³ Draft Guidance, at 6-7.

¹⁴ *Id.* at 8.

voluntarily forgone emissions increase opportunities to which it was entitled outside of the PAL limit for the past decade. Confiscating those emissions should be approached with restraint.

EPA reiterates scenarios identified in the 2002 NSR Rules of when setting a PAL higher than baseline actual emissions plus the applicable significant level is appropriate, including a facility designed to burn different fuels and anticipating a fuel switch during the course of the PAL to the higher-emitting fuel, and a facility designed to manufacture multiple products that anticipates a switch to a product with higher emissions after the PAL renewal.¹⁵ These are excellent examples, but they do not cover the full range of situations where a higher PAL level would be warranted at renewal. Sources operate to provide a compliance margin so as to avoid violations of standards, including PALs, and must maintain that margin despite a variety of operating scenarios that may occur over the 10 year period covered by a PAL.

The Draft Guidance discusses the process for determining PAL renewal levels: if a PAL source's baseline actual emissions of a PAL pollutant plus the applicable significant level are *at or above* 80 percent of the PAL level the PAL may be renewed at the same level without additional considerations. The Associations agree that operating above 80 percent is an indicator that the PAL should in no way be ratcheted. In discussing the scenario where emissions have been below the 80 percent level, EPA states that sources *at a minimum* should be given a reasonable operating margin considering the significant emission rate or higher based on justification. EPA cites its 2002 rulemaking reasoning that this 80 percent threshold as "reasonably representative" of baseline actual emissions.¹⁶ EPA should clarify that even where a source is operating below the 80 percent threshold, the source should receive the benefit for having achieved a large compliance margin relative to the PAL level. The Associations agree that the rules do not preclude even raising the PAL level. We are concerned, however, that the statement on page 8 of the Draft Guidance may be misleading because the parenthetical "generally equal to the significant emission rate" does not take into account the concept of a reasonable operating margin. A reasonable operating margin could be higher than the significance level, depending on the overall level of the PAL and specifics of the facility. The key here is flexibility and recognizing the particulars of a given fact pattern need to be considered at renewal.

The Draft Guidance lists a series of factors that permitting authorities should consider in determining a proposed PAL level for renewal, including "air quality needs, advances in control technology, anticipated economic growth in the area, desire to reward or encourage the source's voluntary emissions reductions, or other factors as specifically identified in its written rationale."¹⁷ These are all appropriate considerations, but do not necessarily represent an exhaustive list. For example, it may even be appropriate to renew a PAL at a level *higher* than the current PAL in view of the emissions increases a source voluntarily forfeited for each individual change that could otherwise have increased emissions up to the significance level. Further, if air quality goals are cited to support a proposed PAL decrease, before a permitting authority ratchets down a PAL it should be required to determine if there are other opportunities in the airshed to achieve the air quality goal without confiscating emissions under a PAL. Similarly, if a new unit were added

¹⁵ *Id.* at 7.

¹⁶ *Id.* at 6 ("EPA previously stated '[w]e believe that this level is reasonably representative of the source's baseline actual emissions.' 67 FR 80216 (December 31, 2002).").

¹⁷ *Id.* at 7.

under the PAL with unique startup or shutdown emissions, that might be a factor to consider in setting the PAL level.

III. The Draft Guidance's attempts to clarify monitoring requirements under PALs in light of stakeholder concerns are well-founded but should go further.

Sources subject to PALs must follow certain monitoring requirements to demonstrate compliance with the PAL. The PAL regulations provide for four different approaches to satisfy the monitoring requirements, including mass balance calculations, continuous emissions monitoring systems, continuous parameter monitoring systems or predictive emissions monitoring systems, and emission factors.¹⁸ The Draft Guidance makes clear that the PAL regulations support the use of any of these approaches, including emission factors, and do not establish a hierarchy among the options.¹⁹ EPA's statements to this effect are appropriate and comport with the regulations. At the heart of the concerns that EPA has heard, in our view, is the concern that the cost of monitoring for the PAL will end up outweighing the benefits to the company of entering into this voluntary agreement. Given that emission factors have been used for compliance assessment under Clean Air Act programs for years and that they are based on years of gathering data from standard processes/emissions units at sources, these factors represent an accurate and cost-reasonable approach to compliance assessment. Any "hierarchy" of monitoring mechanisms in EPA regulations has always been applied in a manner that represents a balancing of the goal to be achieved by the monitoring and the cost. In practice, however, some permitting authorities have perceived that more is required in the PAL context, simply because the PAL is bringing into consideration emission units that would not otherwise be regulated at all (e.g., emission units that are exempt from permitting or controls under the SIP due to their nature or size).

We support the Draft Guidance's statements that recognize the importance of emission factors in compliance assessment and also encourage EPA to address several other areas of concern regarding the PAL monitoring requirements, including adjustments and validation testing related to emission factors, as well as how to approach missing monitoring data.

a. Emission Factor Adjustment/Validation Testing

The PAL regulations provide for the adjustment of emission factors as appropriate "to account for the degree of uncertainty or limitations in the factors' development."²⁰ The Draft Guidance responds to concerns raised by stakeholders regarding the absence of specific criteria for when or how emission factor adjustment may be deemed appropriate. EPA articulates a number of considerations that both sources and permitting authorities should take into account to determine the appropriateness of a particular emission factor.²¹ EPA also stresses that emission

¹⁸ 40 C.F.R. § 52.21(aa)(12)(ii).

¹⁹ Draft Guidance, at 9-10.

²⁰ 40 C.F.R. § 52.21(aa)(12)(vi)(a).

²¹ Draft Guidance, at 10.

factor adjustment, where appropriate, should be done with generally accepted statistical methods or potentially avoided by developing site-specific emission factors.²²

Another issue regarding emission factors addressed in the Draft Guidance is validation testing. The PAL regulations require sources subject to a PAL that use an emission factor approach to satisfy the monitoring requirements to conduct validation testing to determine a site-specific emission factor “[i]f technically practicable” and “unless the Administrator determines that testing is not required.”²³ In light of stakeholder concerns that such validation testing is overly burdensome, EPA illustrates instances where it believes validation testing would be unnecessary in the Draft Guidance.²⁴ For example, EPA notes that units already subject to testing for a particular PAL pollutant under other Clean Air Act programs likely need not conduct validation testing when contemporaneous data is otherwise available. Likewise, EPA believes that validation testing may be uncalled for when vendor- or literature-based emission factors can be demonstrated to be appropriate and sufficiently conservative. Additionally, the Draft Guidance supports the common sense notion that the regulatory language would not mandate validation testing for an emissions unit that operates with actual emissions generally below the significant level or that the regulations would allow it to be performed on just one representative unit for multiple similar emissions units.

The Associations support these circumstances that EPA identifies as rendering validation testing unnecessary for PAL sources using emission factors, but we believe there are other scenarios where validation testing is similarly inappropriate and not required by the regulations. We encourage EPA to recognize in the final guidance document that this list is not exhaustive. Further, validation testing should serve as a two-way street: while validation testing that yields results significantly below the PAL level may be reason to reduce the PAL in some instances (presumably on the theory that the PAL level of baseline plus significance level should have been based on these factors), similarly, validation testing results that indicate baseline actual emissions should have been higher should allow the PAL to be increased accordingly, as well. EPA should recognize this two-sided potential of validation testing results in the final guidance.

b. Missing Monitoring Data

Under the PAL regulations, sources are directed to “record and report maximum potential emissions without considering enforceable emission limitations or operational restrictions for an emissions unit” for periods where monitoring data is missing or otherwise unavailable, unless the PAL permit specifies another method for determining emissions absent monitoring data.²⁵ Although EPA received some feedback that the regulations lack clarity on how to determine emissions in these situations, EPA asserts in the Draft Guidance that such approaches are best determined on a case-by-case basis between the individual source and the permitting authority.²⁶ The Associations concur with EPA’s finding that such determinations should be handled case-by-case.

²² *Id.*

²³ 40 C.F.R. § 52.21(aa)(12)(vi)(c).

²⁴ Draft Guidance, at 10-11.

²⁵ 40 C.F.R. § 52.21(aa)(12)(vii).

²⁶ Draft Guidance, at 11.

The Associations also stress that an unanticipated lack of monitoring data is not the routine situation and this issue is thus unlikely to present frequent problems in practice. Further, it is important to recognize that the Credible Evidence Rule, which EPA issued back in 1997, provides a meaningful complement to allow sources to demonstrate compliance by making a determination of what its emissions are absent monitoring data. As EPA recognized when it promulgated the Credible Evidence Rule, the rule meant that “both sources and potential enforcers will be put on the same evidentiary footing in an enforcement action.”²⁷ In other words, the rule works in two directions: agencies, including EPA, may use credible evidence to demonstrate noncompliance with an applicable standard, while sources can also use credible evidence to establish compliance. In the final guidance document, EPA should acknowledge that in the rare situations when a source is missing monitoring data, the credible evidence rule may provide a mechanism to demonstrate compliance with the PAL.

IV. The Draft Guidance also appropriately clarifies the calculations for PAL permitting, including how baseline actual emissions for replacement units are treated.

EPA states that it wants to resolve what it terms “potential confusion and inconsistent interpretations” in the Draft Guidance with respect to how replacement units are treated.²⁸ As EPA makes clear, a replacement unit “effectively takes the place of the unit it replaced and thereby carries with it the baseline actual emissions from that replaced unit for purposes of subsequent applicability calculations and permitting actions.”²⁹ This formulation applies to PALs as well as other NSR applicability calculations.

The statements in the Draft Guidance regarding the carrying forward of the replaced unit’s emissions as the baseline (for the appropriate 10-year baseline period) for the replacement unit is not only a valid approach, but is the most natural reading of the regulations. It has always been understood by the regulated community that the determination of the baseline actual emissions for purposes of PAL calculations also applies to future changes. In our view, this is the only reasonable interpretation of the 2002 NSR regulations and was always the intent. Otherwise, the replacement unit could effectively be considered to be a “new unit,” the exact problem that EPA was seeking to avoid in issuing these special baseline provisions.³⁰

²⁷ EPA, *Credible Evidence Revisions; Final Rule*, 62 Fed. Reg. 8314, 8315 (Feb. 24, 1997). EPA expounded on this concept, stating:

EPA, states and citizens will be able to use credible evidence to assess a source’s compliance status and respond to noncompliance. This will help ensure that the government and citizens alike can respond to sources that are not complying with air pollutant emission standards on an ongoing basis, thus furthering the protection of public health and the environment. At the same time, sources will be able to use credible evidence for contesting allegations of noncompliance in enforcement actions.

Id.

²⁸ Draft Guidance, at 13.

²⁹ *Id.*

³⁰ EPA states, “the baseline actual emissions from the unit that was replaced carry over to the replacement unit for purposes of both the initial and any subsequent NSR analyses, including determining baseline actual emissions for the purpose of setting the level of a PAL.” *Id.* at 14.

Indeed, the NSR regulations require this interpretation. Under the regulations, a “new emissions unit” is defined as “any emissions unit that is (or will be) newly constructed and that has existed for less than 2 years from the date such emissions unit first operated.”³¹ An “existing emissions unit,” conversely, is as any emissions unit that is not new (*i.e.*, has existed for 2 years or more).³² The regulations also clearly specify, however, that a “replacement unit, as defined in paragraph (b)(33) of this section, *is* an existing emissions unit.”³³ The regulations provide that the “baseline actual emissions” for an existing emissions unit—necessarily including replacement units—are the “average rate, in tons per year, at which the emissions unit actually emitted the pollutant during any consecutive 24-month period selected by the owner or operator within the [preceding] 10-year period.”³⁴ Thus, the “baseline actual emissions” for an existing emissions unit apply to a replacement unit because it *is* an existing emissions unit, and simply takes the place (and the emissions) of the unit which it replaced.

EPA has already concluded, in the 2002 NSR Reform rulemaking, that “under the new rules, replacement and reconstructed units may, like modified existing units, compare their baseline emissions to their projection of post-change actual emissions to determine whether the replacement or reconstruction results in a significant emissions increase.”³⁵ EPA determined that this approach was more appropriate than requiring replacement and reconstructed units to be evaluated as new emissions units because they “possess ample track records to provide sufficient reason to believe that a projection of post-change actual emissions can be sufficiently reliable, and an up-front enforceable emissions cap is unnecessary.”³⁶ This reasoning applies equally to the initial installation of the replacement unit as well as subsequent modifications to the replacement unit. Moreover, as a replacement unit accumulates operating time the importance of the emissions of the unit which it replaced diminish, as the baseline is determined from any two consecutive years of the past 10.

Thus, the Associations agree that any interpretation that would deprive a replacement unit of the replaced unit’s baseline would be inconsistent with the regulations. The Draft Guidance correctly articulates that the treatment of a replacement unit as taking the place of the unit it replaced does not end as soon as the replacement activity is completed.³⁷ EPA should include this clarification in the final guidance document.

³¹ 40 C.F.R. § 52.21(b)(7)(i).

³² *Id.* at § 52.21(b)(7)(ii).

³³ *Id.* at § 52.21(b)(7)(ii) (emphasis added). A “replacement unit” must also meet a number of criteria, including that it is a “reconstructed unit” or “completely takes the place of an existing emissions unit;” “is identical to or functionally equivalent to the replaced emissions unit;” “does not alter the basic design parameters . . . of the process unit;” and that emissions unit it replaced “is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter.” *Id.* at § 52.21(b)(33).

³⁴ *Id.* at § 52.21(b)(48)(ii).

³⁵ EPA, *Technical Support Document for the Prevention of Significant Deterioration and Nonattainment Area New Source Review Regulations*, at I-4-29 (Nov. 2002).

³⁶ *Id.*

³⁷ Draft Guidance, at 13-14.

V. EPA Should Include Environmental Benefits in Addition to Economic Incentives in the Draft Guidance's Discussion of The General Advantages of PALs.

The Draft Guidance underscores the potential benefits of PALs to sources, along the lines of affording project flexibility within the PAL during the 10 year term.³⁸ It largely ignores, however, the fact that PALs also present a significant benefit to air quality and to state regulators. As EPA recognized in the 2002 NSR Rule in which PALs were first promulgated, “the added flexibility provided under a PAL will facilitate your ability to respond rapidly to changing market conditions while enhancing the environmental protection afforded under the program.”³⁹ In addition to public accountability with respect to emissions bolstered by the PAL program, EPA identified additional environmental benefits, including “promoting voluntary improvements in pollution controls by creating an incentive . . . to control existing and new emissions units to maintain a maximum amount of operational flexibility under the PAL[, as well as] prohibiting serial, small, unrelated emissions increases, which otherwise can occur under our existing regulations.”⁴⁰ PALs thus serve both air quality and economic goals, and EPA should acknowledge the joint benefits of these permits in the final guidance document.

In addition to highlighting the air quality benefits of PALs to state regulators in the final guidance document, the Associations urge EPA to make clear that states have flexibility to manage PAL changes, so as to encourage novel approaches that can improve the availability of PALs. Wisconsin, for example, has already taken steps to streamline PAL permitting to provide that, for sources subject to a PAL, the PAL permit will be on the same cycle as their Title V operating permit.⁴¹ This move allows both permitting regimes to align on similar cycles, so a PAL would be renewed every other Title V permitting cycle. Wisconsin's approach also affords states the flexibility to manage changes to the PAL not as minor NSR revisions, but as changes to the Title V permit. In the final guidance document, EPA should support approaches like the one Wisconsin has proposed, and encourage other states to pursue approaches that avoid the need for sources to undergo minor NSR permitting in order to effect changes under a PAL permit.

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The Associations would be pleased to answer any questions regarding these comments. Please contact Shannon S. Broome at SBroome@HuntonAK.com or (415) 975-3718 or Alexandra Hamilton at AHamilton@HuntonAK.com or (202) 955-1646.

³⁸ Draft Guidance, at 14-15.

³⁹ 2002 NSR Rule, 67 Fed. Reg. at 80,189.

⁴⁰ *Id.* at 80,206.

⁴¹ Order of the State of Wisconsin Natural Resources Board Repealing; Amendment; and Creating Rules, M-24-12b, at 13 (July 31, 2019), available at <https://p.widencdn.net/zp77gl/201909-4A-Adoption-AM-24-12b-re-air-permit-process> (“SECTION 13. NR 406.4(1f)(f) is created to read: For new or modified sources for which no construction permit is required, an operation permit application shall be submitted as required under s. NR 407.04 (1) (b) 3. prior to commencing construction or modification.”).